

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES W. HEWITT)	
Claimant)	
V.)	
)	
B & C MOTORS)	Docket No. 1,065,189
Respondent)	
AND)	
)	
DEPOSITORS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the June 26, 2013 preliminary hearing Order. Joseph Seiwert of Wichita, Kansas, appeared for claimant. David Bogdan of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The preliminary hearing Order indicated claimant's request for medical treatment was denied based upon his failure to provide appropriate notice of accident.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the June 25, 2013 preliminary hearing, in addition to all pleadings in the administrative file.

ISSUES

Claimant requests the Board reverse the preliminary hearing Order and grant benefits. Claimant argues he provided notice to Bill Reber, his supervisor.

Respondent maintains the preliminary hearing Order should be affirmed.

The only issue is: Did claimant provide notice of his work injury?

FINDINGS OF FACT

Respondent operated a used car lot and a salvage yard. Claimant began working for respondent in the salvage yard around November 23, 2012, after his friend, "Steve," who worked for respondent, advised claimant that respondent needed additional workers.

Claimant showed up at the salvage yard, but was not allowed to work until Bill Reber, who worked in the salvage yard office, verified with someone over the phone that claimant had permission to work. Claimant testified that Mr. Reber was his supervisor.¹ Claimant also testified that Mr. Reber did not give him directions very often.² Mr. Reber initially kept track of claimant's hours worked. When claimant was asked if he had any conversations with respondent's management, he indicated he really only spoke to Mr. Reber.

Claimant used hand tools such as wrenches, hammers, pry bars, clippers and tin snips to strip approximately 15 vehicles a day for parts. On December 8, 2012, claimant felt a "pop" in his right upper arm while using tin snips to cut a wiring harness off a vehicle. He experienced immediate pain and could not squeeze his right hand. The incident occurred near the end of his shift. Claimant finished off the day using his left hand.

For the next two days, claimant called Mr. Reber, indicating he was sick, but made no reference to a work injury. On the third day, he called Mr. Reber and reported:

A. That there was no way I could work. My arm – I had hurt my arm and, you know, told him exactly what was up.

Q. Okay. Did you explain to him where you had hurt your arm?

A. No, not really. He didn't ask.

Q. Okay. What did you indicate had happened at work?

A. Yes.

Q. How did you indicate that to him?

A. I just told him the other day that I hurt my arm and there was no way I could do anything.³

Claimant also testified that he told Mr. Reber that he "hurt my arm the last day I was there."⁴

¹ P.H. Trans. at 11, 26.

² *Id.* at 11.

³ *Id.* at 13.

⁴ *Id.* at 23-24.

Claimant testified it was his belief Mr. Reber was his supervisor. When questioned regarding this, claimant testified:

- Q. Again, who told you Bill was your supervisor?
- A. He did.
- Q. He did?
- A. That's the only person I really talked to.
- Q Okay. Did he actually say he was the supervisor?
- A. Yes.
- Q. And he told you that on day one?
- A. Yes.⁵

Claimant testified that when he reported the injury, Mr. Reber gave him no direction other than to take as much time as needed to get better. Claimant did not ask Mr. Reber what he needed to do about reporting the accident or whether he needed to notify anyone in the main office that he had suffered a work-related injury.

Claimant previously worked as a foreman and was aware that any time you have an injury, an accident report needs to be completed by the worker. When questioned regarding whether he asked to fill out an accident report, claimant testified:

- Q. Now in this position with [respondent] you did go back to the main office to pick up your – your last pay check, correct?
- A. Yes.
- ...
- Q. Did you talk with anyone there at that time about an accident report or about seeing a doctor or asking for a doctor?
- A. No, there was no one in the office.
- Q. How can you pick up your check?
- A. There was another guy that I had never seen before helped me.

⁵ *Id.* at 26, see also pp. 11-12.

. . .

Q. Did you ever contact anyone in that office at any time regarding your arm, treatment, reporting it, anything?

A. No, just my supervisor.⁶

Kathy Castleberry is respondent's office manager. She testified that Mr. Reber worked in the salvage yard office as an employee without supervisory or managerial powers. She stated that Mr. Reber could not hire or fire employees or direct an employee to get medical attention. Ms. Castleberry testified that Mr. Reber answers phones, tells other employees on what parts need to be pulled based upon customer orders, and collects money from sales. Ms. Castleberry acknowledged that employees were expected to pull parts as directed by Mr. Reber, and if they did not, Mr. Reber could tell her and she would "probably scold" the employee.⁷

Ms. Castleberry indicated Mr. Reber had no authority over other employees, but he "can be in charge if he wants to"⁸

Ms. Castleberry did not recall claimant being hired and did not have much memory of claimant. She indicated respondent has substantial employee turnover. She testified that in the event of a work injury, either she or Bruce, a salesman, would need to be advised. Ms. Castleberry suspected that Bruce was the man who gave claimant his last paycheck.

Claimant's last date of employment with respondent was December 8, 2012. Ms. Castleberry testified that she knew nothing about a work injury until receiving claimant's claim for compensation, which is not in the administrative file. Over objection, Ms. Castleberry testified that Mr. Reber told her that claimant had gone home for personal reasons and claimant never told Mr. Reber he was hurt.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

⁶ *Id.* at 25-26.

⁷ *Id.* at 42-43.

⁸ *Id.* at 41.

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

Mr. Reber not only told claimant he was his supervisor, he was, in fact, claimant's supervisor. Ms. Castleberry's testimony that Mr. Reber was not claimant's supervisor notwithstanding, Mr. Reber told claimant what work to perform.

Nonetheless, this Board Member affirms the preliminary hearing Order. What claimant communicated to Mr. Reber was insufficient in terms of providing the particulars of his injury, that he was claiming benefits under the workers compensation act, or had suffered a work-related injury. The transcript is vague regarding the substance of whatever claimant communicated to Mr. Reber, other than that claimant either hurt his arm “the other day” or the last day he worked, but not that it happened while at work and performing work duties.

CONCLUSIONS

After reviewing the current record and considering the parties’ arguments, the undersigned Board Member concludes claimant did not meet his burden of proving notice.

DECISION

WHEREFORE, the undersigned Board Member affirms the June 26, 2013 preliminary hearing Order.⁹

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Rebecca Sanders

⁹ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.